

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**PATRICIA YVONNE BURNOM**

Claimant

VS.

**CESSNA AIRCRAFT COMPANY**

Self-Insured Respondent

Docket No. **1,056,443**

**ORDER**

Respondent requests review of the September 17, 2012 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. David M. Bryan, of Derby, Kansas, appeared for claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ, consisting of the transcript of the August 18, 2011 preliminary hearing, with exhibits; the transcript of the June 19, 2012 preliminary hearing, with exhibits; the evidentiary deposition of Eric Scarbrough dated August 24, 2011; the evidentiary deposition of Shirley Shockley dated August 24, 2011; and all pleadings contained in the administrative file.

After considering additional evidence admitted after the Board's Order dated November 28, 2011, the ALJ found claimant satisfied her burden of proof that she sustained a compensable series of repetitive accidents arising out of and in the course of her employment.

**ISSUES**

Respondent argues claimant failed to prove she sustained a series of repetitive accidents that arose out of and in the course of her employment. Respondent also maintains claimant's bilateral knee conditions were aggravated by the work she performed for her husband's mobile car wash business and therefore respondent is not responsible to provide any workers compensation benefits.

Claimant contends the ALJ's Order should be affirmed.

The sole issue presented to the Board for consideration is whether claimant sustained a repetitive series of accidental injuries arising out of and in the course of her employment with respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record, this Board Member makes the following findings of fact and conclusions of law:

This is the second time this claim has come before the Board. Following a preliminary hearing on August 18, 2011 the ALJ entered a preliminary hearing Order dated September 14, 2011 finding, *inter alia*, that claimant successfully proved she sustained a series of repetitive injuries to both knees while performing her regular duties for respondent through April 25, 2011. The ALJ awarded temporary total disability benefits and medical treatment.

Upon respondent's application, the Board reviewed the September 14, 2011 preliminary hearing Order. The undersigned Board member entered an Order dated November 28, 2011, reversing the ALJ's Order and finding claimant did not prove a series of repetitive accidents arising out of and in the course of her employment.

Following a prehearing settlement conference on February 15, 2012, the ALJ entered an order appointing Dr. Pat Do to perform a neutral medical evaluation. Dr. Do examined claimant on April 18, 2012 and issued a narrative report to Judge Barnes bearing the same date.<sup>1</sup>

A second preliminary hearing was conducted on June 19, 2012. Claimant provided additional testimony and medical reports from Dr. George Fluter and Dr. Do were admitted into evidence. Also admitted was a surveillance DVD that showed some physical activities in which claimant engaged on May 9-11, 2012. A second preliminary hearing Order was entered by the ALJ on September 17, 2012, again finding claimant proved she suffered personal injury by a series of repetitive accidents arising out of and in the course of her employment with respondent. Medical treatment was awarded.

The factual findings in the Board's previous Order are found to be accurate based on the evidentiary record at that time and are incorporated herein by reference as though fully set forth.

In the Board's initial Order, it was found that the date accident was June 21, 2011, and that notice was timely provided to respondent.

At the June 19, 2012 preliminary hearing, claimant's testimony largely duplicated her previous testimony. She testified she has not aggravated or sustained any new injuries to her knees after last working for respondent. Claimant admitted that she wiped windows for her husband's business of cleaning vehicles for car dealerships.

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<sup>1</sup> Although Dr. Do's report was automatically a part of the record pursuant to K.S.A. 44- 516, the report was offered as an exhibit at the June 19, 2012 preliminary hearing.

The surveillance DVD taken on May 9-11, 2012, shows claimant assisting her husband cleaning cars. Specifically, the DVD reveals claimant being on her feet walking and moving about, bending (including bending at the knees), twisting, stooping and wiping down cars.

On January 9, 2012, Dr. Fluter examined claimant and diagnosed bilateral knee pain and arthritis; right knee internal derangement; and status post right knee arthroscopy on October 14, 2002. The doctor opined regarding causation:

Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between Ms. Burnom's current condition and repetitive work-related activities. Repetitive work-related activities, in my opinion, represent the prevailing factor in this particular case, rather than the reported incident occurring sometime around March, 2011.<sup>2</sup>

Dr. Fluter recommended right and left total knee replacement surgery due to claimant's condition.

On April 18, 2012, Dr. Do performed a medical evaluation at the request of the ALJ. Dr. Do diagnosed bilateral knee pain with degenerative joint disease and meniscal pathology. Dr. Do opined:

Within a reasonable degree of medical probability, certainly the activities that she describes can aggravate, accelerate and make active those symptoms.<sup>3</sup>

Dr. Do recommended vicosupplementation, but indicated claimant may need bilateral total knee replacements.

The "Old Act" principles of law applicable to the Board's review of this claim are set forth in detail in its Order dated November 28, 2011, and it would serve no purpose to repeat those principles here.

The record now contains three opinions from qualified physicians that tend to support claimant's position that she sustained personal injury by a series of repetitive traumas arising out of and in the course of her employment. Dr. Murati opined claimant has, in addition to bilateral patellofemoral syndrome, "[p]ermanent acceleration and aggravation of bilateral knee osteoarthritis." Dr. Fluter expressed the opinion there is "a causal/contributory relationship between Ms. Burnom's current condition and repetitive work-related activities." Dr. Do, who was not retained by any party but was rather appointed by the ALJ to conduct a neutral medical evaluation, concluded "certainly the

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<sup>2</sup> P.H. Trans. (Jun. 19, 2012), Cl. Ex. 1 at 5.

<sup>3</sup> *Id.*, Cl. Ex. 2 at 2.

activities that [claimant] describes can aggravate, accelerate and make active those symptoms [bilateral knee pain].”

Although Dr. Murati’s opinions were a part of the record when the Board conducted its previous review, the reports of Drs. Do and Fluter were not. The undersigned Board member finds the record contains no qualified medical opinion contradicting the opinions of Drs. Do, Murati and Fluter. In view of Dr. Do’s use of the word “can” his causation opinion, standing alone, might be insufficient regarding causation, but when Dr. Do’s opinion is considered together with claimant’s testimony and the opinions of Drs. Murati and Fluter, this Board member is persuaded claimant has now satisfied her burden of proof that she sustained personal injury by repetitive traumas arising out of and in the course of her regular job duties for respondent.

The surveillance evidence offered by respondent has little, if any, probative value. Claimant’s need for additional treatment, including possible bilateral total knee arthroplasties, predated claimant’s activities in May 2012.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>5</sup>

**WHEREFORE**, the undersigned Board Member finds that the September 17, 2012 preliminary hearing Order of ALJ Nelsonna Potts Barnes, is hereby affirmed in all respects.

**IT IS SO ORDERED.**

Dated this 30th day of January, 2013.

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HONORABLE GARY R. TERRILL  
BOARD MEMBER

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Nelsonna Potts Barnes, Administrative Law Judge

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<sup>4</sup> K.S.A. 44-534a.

<sup>5</sup> K.S.A. 2010 Supp. 44-555c(k).